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JAMES H. MCKENNEY,
Clerk.

Supplementary Brief for Defendants in Error

SUPREME COURT OF THE UNITED STATES

October Term, 1900

No. 209.

ALLEJANDRO BARKER, BALERINA BARKER, ANGELA BARKER, ET ALS.,

Plaintiffs in Error,

vs.

DOWNEY HARVEY, Administrator of the Estate of John G. Downey, Deceased, and THE MERCHANTS' EXCHANGE BANK OF SAN FRANCISCO,

Defendants in Error.

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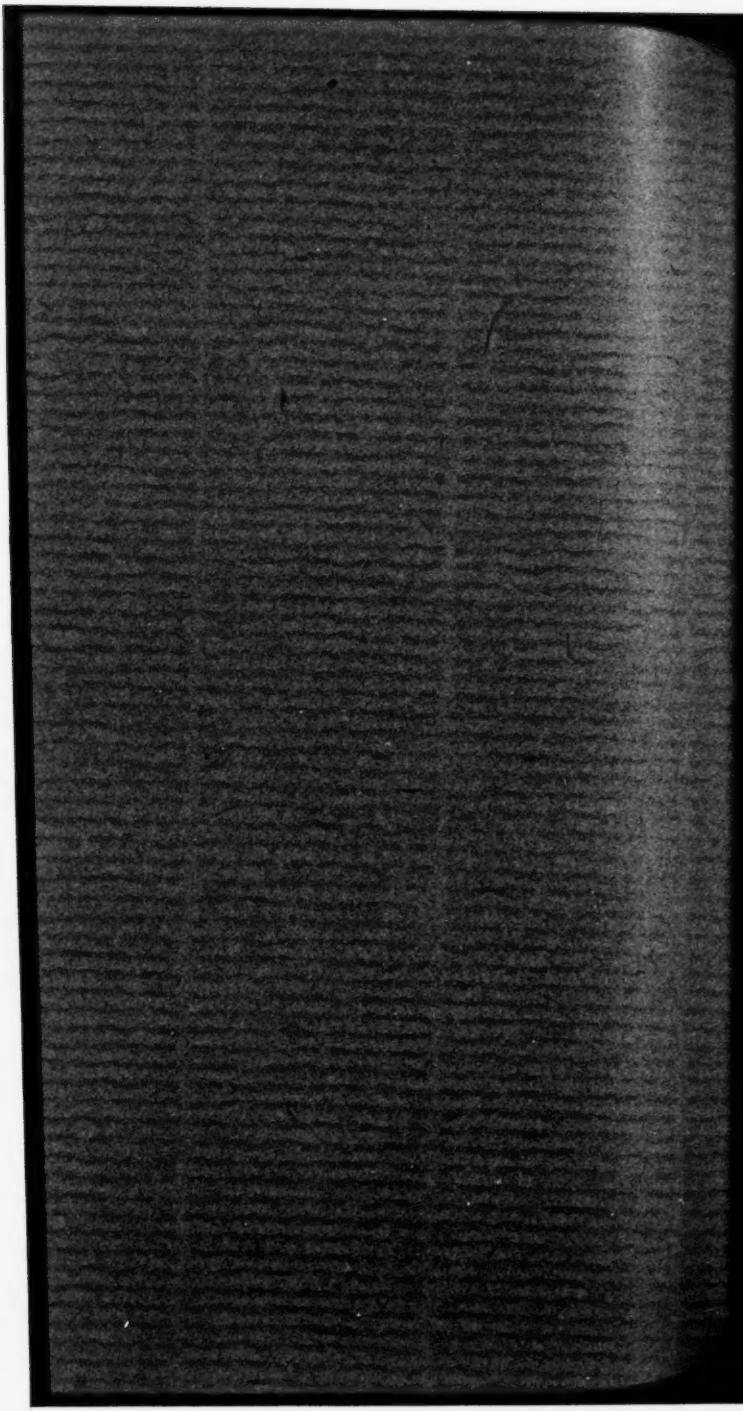

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vs.
J. DOWNEY HARVEY, et al.,
Defendants in Error.

SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR.

We crave the indulgence of the Court for a short supplemenal brief in this cause. Owing to the distance of the parties from Washington our brief was prepared before the filing of the brief for the plaintiffs in error, and we desire shortly

to call attention to some matters referred to in that brief, and also to make one point which we had not made and which the brief of plaintiffs in error recalled to our attention.

I.

The contention of plaintiffs in error that so much of Byrne vs. Alas as holds that under Spanish and Mexican law "whenever Indian settlements are established and the Indians till the ground they have a right of occupancy in the lands they need and use, and whenever a grant is made to include such settlements the grant is subject to such occupancy" is left in full force and effect, is not sustained in our judgment by an examination of the case of Harvey vs. Barker. The Court in that case say "Bryne vs. Alas can no longer be considered as authority." It is true that the Court add that this was "more especially as to the consequences resulting from the non-presentation of claims of title to land arising under the laws of Spain or Mexico, and the scope and effect of patents based upon such claims of title." But this language follows a discussion of the opinion of the Court in Byrne vs. Alas in which the Indian rights claimed by the plaintiffs in error are characterized as "asserted rights of the Mission or Pueblo Indians under the Spanish or Mexican regime," and these rights

are further characterized as "alleged rights," and the entire discussion of the Court shows that while the Court did not deem it necessary to expressly repudiate the existence of such alleged rights that the doctrine of Bryne vs. Alas upon this point was not approved by the Court and was not specifically overruled, since in the judgment of the Court the existence of such alleged rights were immaterial to the discussion, since the "grant to Warner neither reserved nor preserved any possessory or other right or supposed rights in the Indians" for the obvious reason that the prefect had reported the land to be vacant and abandoned, and, as is said by the Court in their opinion. "Therefore if it were permitted to go behind the patent — to the grant itself there was no defense on the part of the appellants (plaintiffs in error) to the plaintiffs' (defendants in error) action."

It is worth observing on this point that the evidence in this case does not show that at the time of the grant in 1844 the Indians tilled this ground. The evidence of Warner, which is the most satisfactory on this point, shows that there were but ten families at that time at Agua Caliente. Whatever planting the Indians did he says did them little good. They were evidently nomadic and lived, as we have shown in our brief, in other ways than by tilling the soil.

II.

The ingenious argument of the plaintiffs in error that this Court is bound by that portion of the opinion in Byrne vs. Alas, which they contend is not overruled in Harvey vs. Barker, to overrule the case of Harvey vs Barker in that portion in which it overrules Byrne vs. Alas, when analyzed answers itself. In effect this argument is that Byrne vs. Alas is not overruled by Harvey vs. Barker since the Court say that the conditions of the grant in Harvey vs. Barker are different from the conditions of the grant considered in Byrne vs. Alas, and therefore the Court found it unnecessary to overrule so much of Harvey vs. Barker as declares the Indian rights claimed by plaintiffs in error. But, say the plaintiffs in error, continuing their argument, the Court in Harvey vs. Barker are in error in supposing there was any difference in the circumstances under which the two grants were made, and therefore this Court being bound by the overruled decision should overrule the later decision in which it was overruled.

Conceding the premises of plaintiffs in error, is not the logical conclusion that this court is bound by the opinion of the Supreme Court in California in the case at bar, being the latest declaration of that Court and the application by that Court of the law to the facts in this very

case, and is it not further true, as we will show, that this Court is without jurisdiction in this matter and should dismiss the cause?

III.

Plaintiffs in error make an specious but fallacious argument to show that the grant to Warner did not include the Agua Caliente. We have disposed of this contention in our brief, certainly it is idle to discuss it further than to call attention to the fact again that the *expediente* shows that the property of the San Luis Rey mission, namely, a church which Warner was to pay for and whice was within the grant to him, was in the Indian village at Agua Caliente. The counsel in their citation of Warner's description are not quite fair in leaving out that portion in which he says "In petitioning for my grant I intended to include the whole valley, including Agua Caliento" (Tr. fol. 81) and the preceding testimony in which he declares that he alluded, when he spoke, to the Valle San Jose which included the premises described in the previous grant to Pico (Tr. fol. 79) and that the Pico vineyard was included in his grant and that he took possession and maintained the vineyard (Tr. fol. 79-80) It is interesting to note that Warner also testifies that the Indians at Agua Caliente were of the Coahuilla nationality.

We might add that the reasons why no especial notice was given to San Luis Rey mission in the investigation before the prefect were two.—

First, the San Luis Rey mission and all these ranches were included in the San Diego district, which extended to and included San Juan Capistrano, and the certificate of Father Olivas was sufficient.

Secondly, the only priest in 1844 and 1845 at the San Luis Rey mission was Padre Jose M. Zalvidea, who was in a state of dotage, (Bancroft, Vol. 21, Page 422) and it would have been useless to have applied to San Luis Rey.

IV.

We think we have disposed of the argument based on the reservation of *servidumbres* in the grant. We concur with plaintiffs in error that the definition contained in the Nuavo Dictionario de la Lengua Castellanna is the ordinary meaning of the word, and an examination of Escriche's dictionary will show not only the definition cited but the other meanings of the word which we have cited in the appendix to our brief. Instead of citing the law dictionary we have preferred in our brief to go back to the Partidas, which is the basis of the law and from which the definitions in all the dictionaries are drawn. We

think there can be no question that whether one applies the rule of *noscitur a sociis,* a rule founded on the habits of human thought and as applicable to a Spanish or Mexican instrument as to one in the English language, or whether we interpret the word in the light of all the surrounding circumstances in its ordinary use, that cannot include rights of the character claimed by the plaintiffs in error.

V.

We ask the Court to dismiss this writ of certiorari and also that in the case No. 210, Quevas vs. Barker. Plaintiffs in error rely upon the decision of this Court in the Christy vs. Pridgeon, 4 Wall. 196, in which Mr. Justice Field held that the Mexican Colonization Law of August 18, 1824 "though general to the republic of Mexico was, so far as it affected lands within the limits of Texas, a local law of the new State as much so as if it had originated in her legislation." And added, "The interpretation, therefore, placed upon it by the highest court of that State must, according to the established principles of this Court, be accepted as the true interpretation, so far as it applies to land in that State whatever may be our opinion of its original soundness."— In the case of a different ruling of the Supreme Court of another State organized out of Mexican

territory such decision was declared by the lower Judge to be a rule of property.—And adds, "The courts of the United States in comformity with the same principles follow a different ruling so far as it applies to titles in those States."

We respectfully suggest to this Court that if, as urged by plaintiffs in error, the decision in Byrne vs. Alas holding that Indians have rights which are preserved under the Mexican Colonization Law of August 18, 1824, is a rule of property binding on this Court, then it follows as a matter of course that the decision of the Supreme Court of California in Barker vs. Harvey in holding in the case at bar that the "grant under consideration did not interfere with any such alleged rights, therefore if it were permitted to go behind the patent and the grant itself, there was no defense on the part of the appellants to the plaintiffs' action" is also a rule of property and is binding upon this Court. Moreover, the judgment should not only be affirmed but this Court should dismiss the action on the ground that it has no jurisdiction, for although the question whether such rights were preserved by the treaty of Guadalupe Hidalgo and whether the patent is conclusive are Federal questions reviewable by this Court, the question of local law is not so reviewable, and even if the issue as to the conclusiveness of the patent was decided erroneously,

the decision holding that the finding of the prefect was conclusive against the plaintiffs in error is sufficient to support the judgment, and this Court has no jurisdiction.

City and County of San Francisco vs. Scott, 111 U. S. 768.

Phillips v. Mound City Land & Water Ass'n, 124 U. S. 605

Crystal Springs Land & Water Co., v. City of Los Angeles, 177 U. S. 169.

Since that point was sufficient to support the judgement the appeal must be dismissed.

Pierce v. Somerset Railway, 171 U. S. 640.

Harrison v. Morton, 171 U. S. 38.

Seneca Nation v. Christie, 162 U. S. 33.

Eustice v. Bowles, 150 U. S. 61.

Respectfully submitted,

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